

THE WHITE HOUSE

WASHINGTON

September 8, 1975

Executive Registry

75-8594

MEMORANDUM FOR:

HENRY A. KISSINGER

FROM:

PHILIP BUCHEN *P.W.B.*

SUBJECT:

Requirements of Section 662(a),
The Foreign Assistance Act of
1961, as Amended, Concerning
Expenditures for Certain CIA
Operations

1. The Statutory Provision

Section 662 of the Foreign Assistance Act of 1961, as Amended (22 U.S.C.A., Sec. 2422) reads in its entirety as follows:

- (a) No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States and reports, in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives.
- (b) The provisions of subsection (a) of this section shall not apply during military operations initiated by the United States under a declaration of war approved by the Congress or an exercise of powers by the President under the War Powers Resolution.

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The required finding by the President

(a) When it must be made

The statute makes a finding by the President a condition precedent to the expenditure of funds for an operation that is covered by the statute. Therefore, no funds should be expended until after the President has made his finding.

(b) What the finding should be

The President must find for each operation that it is "important to the national security of the United States."

(c) How the finding should be made

As a matter of good practice, it should be in writing, signed by the President and should be supported by documents which the President has reviewed and which give a description and scope of the proposed operation and give a basis for determining that the proposed operation is important to the national security of the United States.

(d) Dissemination of finding

There appears to be no requirement under Section 662 (a) that the President's written finding must be furnished to the appropriate Committees of the Congress; only that "a description and scope" of the operation covered by the finding be reported to such Committees. Before Section 662 was added to the Act in 1974, there was a more general provision about Presidential findings, namely Section 654 (22 U.S.C.A. Sec. 2414). It relates only to cases where the "President is required to make a report ... concerning any finding or determination" under the Act. Then the following provision appears in Subsection (c) in respect to such a Presidential finding.

"[It] shall be published in the Federal Register as soon as practicable after it has been reduced to writing and signed by the President. In any case in which the President concludes that such publication would be harmful to the national

security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published."

This section was tailored to the situation where the finding itself was to be reported to Congress, and it does not cover the situation under Section 662 where the reporting requirements deal not with the finding itself or the basis on which it has been made, but with a description of the operation which follows from the finding.

Moreover, in the case of findings under the new Section 662 even a public disclosure that a finding was made under that section would itself be harmful to the national security and would vitiate the President's authority to have the CIA carry out covert operations. Public notice that a finding has been made in the context of known developments or events within a particular country would inevitably allow inferences as to the location and purpose of the planned covert operation, even though the published notice did not by itself disclose such information.

It is evident from the legislative history of Section 662 that it was a sui generis provision, that it was conceived and adopted without consideration of any other provisions in the Act, that its purpose was to provide information for only the jurisdictional committees concerned with CIA operations and the respective Senate and House Committees on Foreign Relations and on Foreign Affairs, and that even for the particular committees to be involved "the quality or the detail or the minutia" of the report would be up to the President (Congressional Record of October 2, 1974, p. S.18063-5; House Conference Report 93-1610 of December 17, 1974 on S. 3394 at pp. 42-3). In the Conference Report, it was stated:

"The committee of conference agreed that strict measures should be taken to insure maximum security of the information submitted to the Congress pursuant to this provision."

Such measures would be in vain if the existence of a covert operation became known through a publication requirement of any kind as provided in Section 654.

Therefore, it is concluded that the purpose and effect of Section 654 conflicts with Section 662, with the intent of Congress when it enacted the latter section, and with the right and authority of the President in the protection of national security and the conduct of foreign affairs. Consequently, there exists no dissemination or publication requirement for a finding by the President under Section 662.

3. The required reports by the President to the appropriate Committees of the Congress

(a) When they must be made

Section 662 was added in 1974 to the Foreign Assistance Act. The attached memorandum from the CIA makes a convincing argument for interpreting the words "reports, in a timely fashion" to mean that the act of reporting is not a condition precedent to expenditure of funds. It deals with the ambiguity created by the words "unless and until" which precede the verb "finds" and the verb "reports" but which cannot apply to both verbs without rendering nugatory the next words "in timely fashion." It resolves this ambiguity by concluding that the words "in timely fashion" give to the reporting requirement a status different from the finding requirement so as to allow reports to be made after the start of expenditures. This is certainly a valid interpretation, and it allows for reasonable time to include all the appropriate committees as recipients of the required reports. For purposes of demonstrating good faith compliance with these reporting requirements, the report of each operation

should be made with due and deliberate speed. The Chairman of each Committee should be notified of a finding by the President as soon as secure communication to him is possible, along with information as to the nature and location of the operation sufficient to permit the Chairman to judge how quickly he may want the "description and scope" to be reported. This method should satisfy the "timely fashion" requirement for each intended recipient of such a report, without in any way conceding that the report must precede the initiation of expenditures.

(b) The recipients of the reports

The language in Section 662 which specifies the recipients of reports is: "appropriate committees of the Congress, including the Committee on Foreign Relations of the United States Senate and the Committee on Foreign Affairs of the United States House of Representatives." The history of the legislation indicates that beyond the two committees expressly included, the other committees (or subcommittees) were at the time of enactment intended to be "the present Armed Services Committees and the present Subcommittees handling the oversight of matters of intelligence and the CIA," the latter being subcommittees of the respective Senate and House Appropriations Committees (Congressional Record of October 2, 1974, p.5, S.18064). Since then the Senate and House have each created Select Committees with authority which includes investigation of the extent of, and necessity for, covert intelligence activities in foreign countries. However, these are committees of limited duration which have not supplanted in oversight of intelligence matters the previously established and continuing committees serving this purpose. While the Select Committees may be entitled to the same information, this particular statute does not appear to require their inclusion as recipient of timely reports on each new operation covered by Section 662.

(c) Who is to report

Section 662 requires the President to report, but there is nothing to prevent him from delegating his authority and responsibility in that regard, as he has done, to the Director of CIA. It may be better practice in the future to have the President, when he makes a written finding, delegate in writing to the Director the authority and responsibility to make the required reports.

(d) Form and content of reports

The reports have to provide "a description and scope" of each operation. According to the legislative history, and as has been accepted in practice, the reports may be oral. Also, in the process of the Congressional debates the words "detailed description of the nature and scope" were deliberately changed to allow latitude on the part of the President. (See Congressional Record of October 2, 1974 at S.18063-4).

(e) Record of reports

Apart from whatever record each recipient committee may make of each report, it will be good practice for the Director of CIA to provide a full record for the President of the time, nature and scope of each preliminary approach and ultimate report made pursuant to Section 662.

cc: William Colby ✓
Jim Lynn